RIGHT OF MATERIALMAN TO SUE THE SURETY ON CONTRACTOR'S BOND.—In the recent case of *Forburger Stone Co.* v. *Lion Bonding and Surety Co. et al.* (Neb., Feb., 1919), 170 N. W. 897, a materialman sued on a surety's bond conditioned upon the faithful performance by the contractor of his contract to pay for materials used in construction of a private building. The bond contained the following provision: "That the said surety shall be notified in writing of any act on the part of said principal, which shall involve a loss for which the said surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of the duly authorized representative or representatives of the obligee herein, who shall have supervision of the completion of the said contract". No such notice was given by the plaintiff in this action, but he was allowed to recover (three justices dissenting) on the ground that the agreement to pay for material used was for the benefit of the materialman and that notice as required by the bond was impossible in this instance because "the plaintiff did not have a representative in this business" and "could not know when some act of the contractor came to the knowledge of the owner of the building".

The strict English rule that a third party cannot sue upon a contract to which he is not a party except under the circumstances summarized in *Mellen* v. *Whipple*, 1 Gray 317, has not met with general favor in this country, and whether the right is sought to be founded upon code provision, or the theory of trusteeship in the promisor or agency in the promisee, or upon blood relationship or existing legal obligation between the promisee and the third party, the latter is usually conceded the right today in this country to sue upon a promise made for his benefit. *Pennsylvania Steel Co.* v. *N. Y. City Ry. Co.*, 198 Fed. 721, 749; ANSON, CONTRACTS, KNOWLTON'S ED., note p. 279; PARSONS, CONTRACTS, 9th Ed., Vol. I, p. 503, 505; note, 25 L. R. A. 257. In *Jefferson* v. *Asch*, 53 Minn. 446, the Court says, "But we do not think there is any case to be found in which such an action was sustained upon a bare promise, with no other circumstances to justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties". Yet those jurisdictions which hold that a mortgagee of premises may sue upon a grantee's promise to assume the mortgage even though the grantor is not personally liable therefor, certainly go far in the direction of conferring upon a mere volunteer the right to sue. *McDonald* v. *Finseth*, 32 N. D. 400; *Hare* v. *Murphy*, 45 Neb. 809; *Crone* v. *Stinde*, 156 Mo. 262 (deed of trust); *McKay* v. *Ward*, 20 Utah 149. And Indiana has now distinctly announced that no legal or equitable duty due from the promisee is requisite to a recovery by the third party. *Reed* v. *Adams Steel and Wire Works*, 57 Ind. App. 259. Pennsylvania and Oregon have seemingly followed the doctrine of *Jefferson* v. *Asch*, *supra*, in denying the materialman's right to recover against the surety on the ground that the former is in no way a privy to the contract. *Brower Lumber Co.* v. *Miller*, 28 Ore. 565; *Parker* v. *Jeffery*, 26 Ore. 186; *First Methodist Episcopal Church* v. *Isenberg*, 246 Pa. St. 221. In a majority of the courts the only inquiry in such a situation as the principal case presents is whether or not the intent

of the contracting parties was to benefit the third party. (For a discussion of the power of the municipality, without aid of statutory provision, to require protection for laborers and materialmen, see *City and County of Denver* v. *Hindry*, 40 Colo. 42, 11 L. R. A. (N. S.) 1028 and note.)

It would seem that the law is well settled that if the bond given by the contractor is conditioned against *liens or claims on the property*, the sureties are not liable unless the property is such that liens or claims may be asserted against it. *Smith* v. *Bowman*, 32 Utah 33, 9 L. R. A. (N. S.) 889, and note. Hence, if the contract is with a municipality or public corporation the surety cannot be liable to anyone on the bond. Yet, as was brought out in *Lumber Co.* v. *Schwartz*, 163 Mo. App. 659, such a conclusion makes the stipulation absolutely meaningless, and the court in that case regarded the contract as one for the benefit of the materialmen. See also *National Surety Co.* v. *Foster Lumber Co.*, 42 Ind. App. 671. But certainly in the absence of provisions or phraseology showing an exclusive purpose to indemnify or protect the city, a bond requested by the latter and conditioned for payment by the contractor of all claims for material might reasonably be construed as a dual contract by the city on behalf of itself and materialmen who could assert no lien or claim on the property when completed. COOLEY, C. J, in *Knapp* v. *Swaney*, 56 Mich. 345; *Denvers* v. *Howard*, 144 Mo. 671; *American Surety Co.* v. *Thorn-Halliwell Cement Co.*, 9 Kan. App. 8; *Kaufmann* v. *Cooper*, 46 Neb. 644; *Williams* v. *Markland*, 15 Ind. App. 669; *United States Gypsum Co.* v. *Gleason*, 135 Wis. 539; *Mack Mfg. Co.* v. *Mass. Bonding and Insurance Co.*, 103 S. C. 55; *Baker* v. *Bryan*, 64 Ia. 561; *Citizens Trust and Guaranty Co.* v. *Peebles Paving Brick Co.*, 174 Ky. 439, *semble*. While, as was contended in the dissenting opinion of the principal case, a private contract might perhaps be distinguished on this ground, there are a number of cases which make no effort to differentiate. *Ochs* v. *Carnahan*, 42 Ind. App. 157; *Concrete Steel Co.* v *Illinois Surety Co.*, 163 Wis. 41. And those which grant recovery on the *owner's* promise to pay the materialmen are seemingly in accord as far as principle is concerned. *Carolina Hardware Co.* v. *Raleigh Banking and Trust Co.*, 169 N. C. 744, which held that the owner's promise to pay for materials made the contractor a mere agent; *Gaffney* v. *Sederberg*, 114 Minn. 319; *Morrison* v. *Payton*, 31 Ky. L. Rep. 992. But in any view of the matter, the intent is one of fact and if apparent from the terms of the contract or bond, that intent will govern the relations of the parties and their rights. *Sample* v. *Hale*, 34 Neb. 220; *Doll* v. *Crume*, 41 Neb. 655; *Equitable Surety Co.* v. *U. S.*, 234 Fed. 448, (statute); *Greenfield Lumber and Ice Co.* v. *Parker*, 159 Ind. 571; *Gretchell and Martin Lumber Co.* v. *Peterson and Sampson*, 124 Ia. 599; *Searles* v. *City of Flora*, 225 Ill. 167; *Montgomery* v. *Rief*, 15 Utah 495; *Union Sheet Metal Works* v. *Dodge*, 129 Cal. 390; *Standard Gas Power Corporation* v. *New England Casualty Co.*, 90 N. J. Law 570; *Burton Machinery Co.* v. *Ruth*, 196 Mo. App. 459.

The argument of the majority opinion in the principal case that the materialman could not know when the defaulting act of the contractor came to the knowledge of the owner is fully met by the question put by Justice

DEAN'S dissent: "Who knew better than plaintiff as to the time when the contractor failed to pay for the building stone? Who but the plaintiff, whose knowledge was first hand, would be expected to bring the fact of nonpayment 'to the knowledge of the owner of the building'?" If, however, it was impossible for the third party to give the required notice, should he be privileged to escape performance of the substantial conditions of the bond and sue on a contract of his own making? To concede to the third party greater liberties than those enjoyed by the signatory obligee is indeed a departure not only from justice and reason but from law established by an overwhelming consensus of opinion. *Knight and Jilson Co.* v. *Castle,* 172 Ind. 97, 27 L. R. A. (N. S.) 573; *Episcopal Mission City* v. *Brown,* 158 U. S. 222; *Trimble* v. *Strother,* 25 Ohio St. 378; *Green* v. *McDonald et al.,* 75 Vt. 93; *Clay* v. *Woodrum,* 45 Kan. 116; *Heath* v. *Coreth,* 11 Tex. Civ. App. 91; *Dunning et al.* v. *Leavitt,* 85 N. Y. 30; *Malanaphy* v. *Fuller and Johnson Mfg. Co.,* 125 Ia. 719, 723; *Ellis* v. *Harrison,* 104 Mo. 270; *Crowell* v. *Hospital,* 27 N. J. Eq. 650; *Union City Realty Co.* v. *Wright,* 145 Ga. 730. Furthermore, "In determining the question [right of materialmen to sue sureties on contractors' bonds] it is well to bear in mind that sureties are favorites of the law, and that their liability is not to be extended by implication beyond the terms of their contract. They are bound by their agreement and nothing else; and they have a right to stand upon the strict terms of their obligations." *Smith* v. *Bowman, supra.* L. G.